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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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# No. 319

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MRS. BEULAH FISHER LEJEUNE, INDIVIDUALLY AND AS TUTRIX FOR HER MINOR CHILDREN,

*Petitioner,*

*vs.*

EXCESS INSURANCE COMPANY OF AMERICA,

*Respondent*

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.**

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EDWARD DUBUISSON,
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SUPREME COURT OF THE UNITED STATES

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MRS. BEULAH FISHER LEJEUNE, INDIVIDUALLY AND AS TUTRIX FOR HER MINOR CHILDREN,

*Petitioner,*

*vs.*

EXCESS INSURANCE COMPANY OF AMERICA,

*Respondent*

---

## PETITION FOR WRIT OF CERTIORARI

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The petition of MRS. BEULAH FISHER LEJUNE, individually and as tutrix of her four minor children, through undersigned counsel, here seeks a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, overruling a judgment of the United States District Court for the Western District of Louisiana, in favor of petitioner and against EXCESS INSURANCE COMPANY OF AMERICA, one of the two defendants in the suit and hereinafter called respondent.

### Jurisdiction

The judgment of the Circuit Court of Appeals was en-

tered on May 25th, 1951 (R. 74), and its opinion is reported at 189 Fed. 2d 521. Application for re-hearing was timely filed by petitioner on June 15, 1951 (R. 81), and denied without reasons on June 26th, 1951 (R. 98). The jurisdiction of this Honorable Court is invoked under 28 U. S. C. Sec. 1254, Par. (1), 1946 Ed., Supp. IV.

## Statement

Jurisdiction of the suit in the trial court was based on diversity of citizenship and the jurisdictional amount of $3000.00 exclusive of interest and costs.

Petitioner sued for damages for herself and her four minor children for the wrongful death of her husband, and their father. Suit was brought under the Louisiana direct action statute[1] against the defendant insurers, against respondent's co-defendant as the insured's primary public liability insurance carrier, and against respondent as the insured's carrier of public liability insurance in excess of the liability limit of the primary carrier. Recovery was sought on the ground of the negligence of the insured, as a result of which negligence decedent was allegedly electrocuted in Eunice, Louisiana, on September 20, 1947. Respondent and its co-defendant were served through the Louisiana secretary of state and ex-officio commissioner of insurance, on the assumption that both insurers were qualified to do business in Louisiana and had therefore appointed that official as their agent for service of process. Respondent's co-defendant was qualified to do business in Louisiana and promptly joined issue but respondent, contending that it was not transacting business in Louisiana, maintained no office or agents there, and had appointed no agent for service of process in that state, filed a motion to dismiss on

[1] Act 155 of 1930, Appendix, p. 38.

the ground of lack of jurisdiction over its person, improper venue, insufficiency of process and insufficiency of service of process (R. 14). While respondent's said motion was pending petitioner filed a supplemental complaint and served respondent through the secretary of state as its agent for service of process in meticulous compliance with two Louisiana statutes, Act 179 of 1918, sec. 1, subdiv. (6), par. (c[2]), and Act 195 of 1948, sec. 27.03, (b[3]). Respondent then renewed its motion to dismiss (R. 39). The trail judge overruled the motion (R. 42, 43), and respondent answered with reservation of its motion. The case was tried to a jury which found a verdict for plaintiff for $48,000.00 for herself and her said children (R. 62), and judgment was entered on the verdict (R. 65, 66). The court below affirmed as to respondent's co-defendant but reversed as to respondent on the ground that the latter's moton to dismss was good and should have been sustained. Petitioner's timely application for rehearing was denied and petitioner is here asking for review.

Respondent's motion to dismiss was tried on the complaint as amended, on an affidavit attached thereto (R. 14, 15), on the policy on which respondent was sued (R. 16-19, 102A-102C) and on two stipulations (R. 20-24). The facts shown by these instruments may be condensed briefly thus:

> Respondent was a New York corporation which had been qualified to do business in Louisiana prior to the year 1938. Thereafter, it maintained no office in Louisiana and no agents or representatives there, and had not appointed the Louisiana secretary of state or anyone else as its agent for service of process in that state. Respondent wrote the first of the series of

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[2] Appendix, p. 38.

[3] Appendix, p. 40.

policies here involved to cover the operations of Louisiana Public Utilities Company, Inc., in Louisiana, through a Texas broker, which policy was dated January 1, 1944. The policy was renewed yearly thereafter until May 31, 1946, when the policy was re-written through a Louisiana broker. On November 29, 1946, the policy was amended by endorsement to cover the Gulf Public Service Co., Inc., a Louisiana corporation domiciled and doing business in Louisiana, through the negligence of which insured decedent was allegedly electrocuted. The policy and endorsement were written and signed by respondent in New York, mailed by it to the Louisiana broker who delivered the policy in Louisiana to the Louisiana insured covering property situated in Louisiana and collected the premium from it there. The Louisiana broker then mailed the premium to respondent at New York, after deducting therefrom the commission which was due it by respondent for handling the transaction in Louisiana. The policy was in force on September 20, 1947 (R. 23), the date of the accident, but was cancelled on June 3, 1948 (R. 23). Under the terms of the policy respondent had the right to go into Louisiana to inspect insured's premises, plants and equipment, to examine its books and to join in defense of suits on claims arising under the policy. There was no limit to the number of accidents covered by the policy.

## Questions Presented

1. Has a state the right, in the exercise of its police power, to provide by statute[4] for substituted service of process upon an unauthorized foreign insurance corporation, which sells and delivers an insurance contract in the state through a broker residing in the state, to one of its citizens, covering a risk located in the state, in a suit in a court in the state, on an obligation arising under the

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[4] Act 179 of 1918, sec. 1, subdiv. (6) par. (c); Act 105 of 1898, Art. II, sec. 1; Act 195 of 1948, secs. 21.05 & 27.03 (a) & (b); Appendix, pp. 38, 39, 40.

contract in the state, if the insurance company is not otherwise transacting business in the state and has not appointed an agent upon whom service of process may be made as its agent in such a suit, so as to subject the unauthorized foreign insurer to the jurisdiction of courts sitting in Louisiana?

2. Did the sale and delivery by respondent in Louisiana to a Louisiana citizen, through a Louisiana broker, of a series of successive, annual insurance contracts, covering the unbroken period from January 1, 1944, to June 3, 1948, during which period respondent was continuously obligated under the policies to pay to any Louisiana citizens, injured in any number of accidents, during the life of such contracts, damages for bodily injury or death caused to such citizens by the negligence of the insured in the operation of its public utility business in Louisiana, with the right on the part of respondent to go into Louisiana in order to inspect insured's premises, plants, and equipment, examine its books and defend suits which might be brought against insured on claims arising under the policies,—did such activity in Louisiana constitute such a "minimum contact" or "tie", and establish such a "continuing relationship," within that state of such quality as to give Louisiana courts jurisdiction, under appropriate Louisiana process statutes,[5] of respondent's person in this suit brought by a Louisiana citizen on a cause of action growing out of such activity?

3. Did such activity by respondent constitute the "transacting of business" by it in Louisiana for the purpose of subjecting it to the jurisdiction of the trial court under Louisiana statutes providing that the "transacting

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[5] Act 179 of 1918; Act 105 of 1898; Act 195 of 1948, Appendix, pp. 28, 29, &c.

of business" by an unauthorized foreign insurer should be the equivalent of an appointment of the secretary of state as its agent for service of process?

4. Did the repeal of La. Act 105 of 1898, Art. II, sec. 1,[6] which required an unauthorized foreign insurer to appoint the secretary of state as its agent for service of process before issuing a policy in Louisiana, **after a cause of action arose under the policy** herein sued on which had been issued in Louisiana covering a risk located in Louisiana in violation of said statute and prior to its repeal, and after suit had been filed on the policy in Louisiana,—did such repeal deprive the plaintiff of the right, resulting from that violation, to have substituted service of process made upon the defendant insurer under another service of process statute, La. Act 179 of 1918, sec. 1, subdiv. (6) par. (c),[7] which was also in force at the time of the issue of the policy in the state and which latter statute had never been repealed?

5. Is an unauthorized foreign insurer which delivers an insurance contract to a Louisiana citizen in Louisiana, "required" by sec. 21.05 of Act 195 of 1948[8] "to appoint and maintain an agent for service of process" in Louisiana within the meaning of par. (c), of subdiv. (6) of sec. 1 of Act 179 of 1918,[9] the Louisiana Service of Process Act?

6. Does par. (a) of sec. 27.03 of Act 195 of 1948,[10] the Louisiana Insurance Code, purport to make the issuance or delivery in Louisiana of an insurance contract by an unauthorized foreign insurer to a Louisiana citizen "equivalent to an appointment by such insurer of the

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[6] Appendix, pp. 38, 39.
[7] Appendix, p. 38.
[8] Appendix, p. 39.
[9] Appendix, p. 38.
[10] Appendix, p. 39, 40.

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secretary of state" as the insurer's agent for service of process in a suit arising out of such contract, though the unauthorized foreign insurer was not otherwise "transacting business" in Louisiana?

## Reasons for Granting Writ

1. The court below has decided in this case three important questions of federal law which have not been, but should be, settled by this court. Those questions are stated above as No. 1, No. 2 and No. 3. The court below erroneously decided them all in the negative.

The first involves the right of a state, under its police power, to provide for its citizens by substituted service of process, a convenient forum for trying a suit against an unauthorized foreign insurer on a policy sold by the latter in the state of the forum on a cause of action arising under the policy in that state. As a matter of constitutional principle this right would seem to be indistinguishable from the right of a state to provide a convenient forum for its citizens in which to sue a non-resident motorist for damages caused by the latter in the state of the forum by the use of its highways, which right has long since been recognized by this court.[11] The vastness of the public interest in the sale of insurance policies across state lines which has also been recognized by this court,[12] would seem to make that activity peculiarly susceptible to regulation by the police power of the states. Surely the constitutional right of a state under its police power to subject an unauthorized foreign insurer, which sells and delivers a policy to one of its citizens within the state, covering the use of property located there, to the jurisdiction of its courts in a suit on the policy in a court of the state by substituted

[11] *Hess* v. *Pawloski*, 274 U. S. 352 (1927).

[12] *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408 (1946).

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service of process, is a federal question of great importance which has not been settled by this court, at least since the acceptance of the principle of similar regulation by Your Honors in the leading motorist-statute case in the year 1927.[13]

2. The second federal question of great importance which was incorrectly decided below and which has never been settled by this court, but which should be settled by it, is really another aspect of the same problem which is presented by the first question and is academic here if the right of the state discussed in the first question is recognized.

This second question is, what activity by an unauthorized foreign insurer within the state of the forum short of the transaction of business within the definition of the old concepts is necessary to constitute a minimum "contact" or "tie" of such quality as to subject it to the jurisdiction of the courts of the forum under authority of the jurisprudence recently established by this court? The question is raised here by the necessity for the determination of whether the facts of this case as above set forth did subject respondent to the jurisdiction of the state and federal courts sitting in Louisiana. This federal question in turn raises another one of importance, that is, whether "dueness" of process depends at all on whether the suit against the unauthorized foreign insurer is brought by the state of the forum in the interest of all of its citizens, or by a private citizen for his own interest only. In other words, is "dueness" of process different in a so-called "regulatory suit" from what it is in a so-called "private suit" if the "activity" of the unauthorized foreign corporation and its resulting "contact" or "tie" with the forum is the same in each suit? This fallacious distinction in interpreting the jurisprudence of this court has been made elsewhere and

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[13] *Hess* v. *Pawloski*, *supra*.

was contended for in the court below. It is not clear, however, from the opinion of the court below whether it accepted and applied the distinction which is unsound [14] and should be rejected here to clarify the jurisprudence of this court on this important question of due process under the Fourteenth Amendment as it applies to the daily, voluminous sale of insurance polices across state lines by unlicensed foreign insurers.

3. The third federal question presented is whether the activity of respondent as represented by the facts outlined above constituted the "transacting of business" in Louisiana so as to subject it to the jurisdiction of the trial court under Louisiana statutes [15] providing for service of process on an unauthorized foreign insurer transacting business in the state. This question is of general importance because of the need for a re-definition, for the purpose of determining jurisdictional process, of the phrase "doing business" in respect of the activities of unauthorized foreign insurers in states where the substituted service of process statutes apply only to such insurers as are transacting or doing business in the state. But the question is of concrete importance here only if this court should hold that the process was not good on the other constitutional grounds hereinabove urged.

4. If the trial court had jurisdiction over the person of respondent the question of the applicability and efficacy of the state process statutes which plaintiff contends were designed to implement that jurisdiction must next be considered. A writ should be granted to review the decision of the Court of Appeals to the effect that none of the statutes relied on was available to petitioner because,

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[14] Barron & Holtzoff, Federal Practice & Procedure, Vol. 1, sec. 179, p. 314, N. 93.

[15] Act 179 of 1918; Act 105 of 1898; Act 195 of 1948.

as to those statutes, the decision is clearly in conflict with the only applicable local decisions and, in construing the statutes, the court below so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

As we shall demonstrate in the brief which is annexed hereto, the only Louisiana decision [16] which construed two of the Louisiana statutes [17] under which process was so carefully served in this suit, **squarely held** that the process which was had on an unauthorized foreign insurer in a suit in a Louisiana court, by a Louisiana citizen, on a policy which the insurer had sold to another Louisiana citizen through the mails, **was good under those statutes.** The Court of Appeals, however, said that the process here was invalid because the first of those two statutes had been repealed. But the first statute [18] had been repealed [19] only **after the cause of action had arisen under the policy** as a result of decedent's death **and, indeed, only after this suit had been filed.** Nevertheless the court below, **without giving any reason whatever** why the repeal of the first statute after the cause of action had arisen under the policy on which this suit was filed, and **of which policy the statute had become a part,** invalidated the service of process under the second statute,[20] which process had been authorized by respondent's failure to appoint the secretary of state as its agent for service of process **as required** by the first statute, and held that the repeal did deprive plaintiff of the right to process under **the requirement** of the unrepealed statute.

Likewise, the Court of Appeals concluded cavalierly that, subsequent to the repeal of the aforesaid statute, no

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[16] *White* v. *Indiana Travelers Assurance Co.*, 22 So. 2d 137 (1945).

[17] Act 105 of 1898 & Act 179 of 1918.

[18] Act 105 of 1898, Art. II, sec. 1, Appendix, pp. 38, 39.

[19] Act 195 of 1948, secs. 31.11 & 32.01, Appendix, p. 41.

[20] Act 179 of 1918, sec. 1, subdiv. (6) par. (c), Appendix, p. 38.

equivalent statute had been enacted to take its place without even the passing tribute of a reference in its opinion to the statute [21] which plaintiff contends is obviously an equivalent.

The court below then held that the service of process was not good under another section of that statute [22] on the authority of the same decision [23] above referred to which, to the extent that it is applicable, strongly supports the process. In reaching this result in conflict with the said local authority the Court of Appeals ignored several cardinal rules of statutory construction and rejected the applicability of the several process statutes relied on by plaintiff **without discussion** in one short paragraph.

The important question of local law which the Court of Appeals decided in conflict with applicable local decisions [24] was that at the time of the service of process on respondent there was in effect, and available to plaintiff, no Louisiana statute for substituted service of process on respondent as an unauthorized foreign insurer which had issued and delivered a policy in Louisiana to a Louisiana citizen under the circumstances set forth above.

The errors of the court below with their resulting grievous injustice to petitioner and her children are demonstrated in the brief which is annexed hereto.

Because petitioner complied meticulously with the requirements of the invoked process statutes in making service upon respondent the latter tacitly abandoned its contention as to the insufficiency of service of process. That

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[21] Act 195 of 1948, sec. 21.05, Appendix, p. 39.

[22] Act 195 of 1928, sec. 27.0[illegible], pars. (a) & (b), Appendix, pp. 39, 40.

[23] *White* v. *Indiana Travelers Assurance Co., supra.*

[24] *The Flair, Ltd.*, v. *American Fire Insurance Co. et al.*, 135 La. 48, 64 So. 977, (1914); *White* v. *Indiana Travelers Assurance Co., supra.*

contention and the contention that the venue was improper, both of which had been overruled by the trial court, were ignored by the court below.

WHEREFORE petitioner prays that a writ of certiorari be granted to review the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit in respondent's favor and that, after hearing, said judgment be set aside and the judgment of the trial court be reinstated at respondent's cost;

And for all general and equitable relief.

EDWARD DUBUISSON,
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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1951**

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## No. 319

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MRS. BEULAH FISHER LEJEUNE, INDIVIDUALLY AND AS TUTRIX FOR HER MINOR CHILDREN,

*Petitioner,*

*versus*

EXCESS INSURANCE COMPANY OF AMERICA,

*Respondent*

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### BRIEF IN SUPPORT OF PETITION

May it Please the Court:

#### Opinions Below

The trial court's reasons for overruling respondent's motion to dismiss appears at R. 42, 43. The opinion of the Circuit Court of Appeals for the Fifth Circuit is printed at R. 74-80, and its order denying rehearing without reasons is printed at R. 98. The opinion is reported at 189 Fed. 2d 521.

#### Jurisdiction and Statement of the Case

The jurisdictional and other required facts are stated in the foregoing petition and will not be repeated here.

#### Specifications of Error

It is submitted that the court below erred:

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1. In holding that respondent had not subjected itself to the jurisdiction of the district court below in accordance with the requirements of applicable state process statutes[25] as a result of the delivery of the policy herein sued on;

2. In holding that, under all of the facts of the case as set forth in the foregoing petition, respondent had not established such a continuing relationship, and created such contacts or ties within the State of Louisiana, as made respondent subject to the jurisdiction of the district court below;

3. In holding that under the facts of the case respondent was not doing business in Louisiana on the date of the policy so as to be amenable to the jurisdiction of the district court below;

4. In holding that the repeal on October 1, 1948, of Sec. 1 of Art. II of Act 105 of 1898,[26] which required respondent to appoint in writing the secretary of state as its agent for service of process before issuing the policy herein sued on, **after** decedent's death on September 20, 1947, **created the cause of action herein sued on** and **after suit was filed** herein on September 17, 1948, rendered invalid the service of process which was made on May 19, 1949, on respondent through the secretary of state under act 179 of 1918, sec. 1, subdiv. (6), par. (c),[27] (R. 40, 41);

5. In holding that sec. 21.05[28] of Act 195 of 1948, does not require a foreign corporation to appoint and maintain an agent for service of process in the state within the meaning of Louisiana Act 179 of 1918, sec. 1, subdiv. (6) par. (c);

6. In holding that par. (a)[28a] of sec. 27.03 of Act 195 of 1948, did not apply to respondent as an unauthorized foreign insurer which delivered a policy in Louisiana to a Louisiana citizen because that statute applied

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[25] Act 179 of 1918; Act 105 of 1898; Act 195 of 1948.

[26] Appendix, pp. 38, 39.

[27] Appendix, 38.

[28] Appendix, 39.

[28a] Appendix, pp. 39, 40.

only to an unauthorized foreign insurer which, besides delivering a policy to a Louisiana citizen in Louisiana, was also otherwise transacting business there and respondent was not otherwise transacting business there when it delivered the policy herein sued on.

## ARGUMENT

The current national importance of the subject of this brief and the lively contemporary interest in it, is indicated by an article entitled "Service of Process on Unlicensed Insurers" which, by coincidence, was published while this brief was being written in the July issue of the Insurance Law Journal. That article cites an interpretation by Judge Learned Hand[29] of the philosophy of *International Shoe Company* v. *Washington*, 326 U. S. 310 (1945), and reviews the opinion of this court in *Travelers Health Association* v. *Virginia*, 339 U. S. 643 (1950).

### 1

### Jurisdiction by Statute under the Police Power

Since the answer to the first federal question presented turns on the jurisdictional effect to be given to delivery of the policy herein sued on by respondent in Louisiana, to a Louisiana citizen, affecting a Louisiana risk, under applicable process statutes it should first be noted that the policy is a **Louisiana contract which is governed by its laws.** The Louisiana Supreme Court has ruled:[29a]

> "• • • That the contract of insurance is **completed** at the place where the **policy is delivered** and the **first premium collected** has become familiar law."

And this rule was applied in another case[30] by the learned district below in this language:

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[29] *Bornse* v. *Nardis Sportwear, Inc.*, 165 Fed. 2d 33 (1948).

[29a] *City of Lake Charles* v. *Equitable Association*, 114 Ia. 836, 30 So. 578 (1905).

[30] *Landry* v. *Mutual Life Insurance Co. of New York*, 54 Fed. Supp. 356 (1944).

> This contract is to be decided under the laws of Louisiana, as the **delivery of the contract** to plaintiff, Landry, was **made in Louisiana**, and the **first premium** as well as all subsequent premiums to date have been **paid by Landry in this state.**"

From the fact that the policy sued on is a Louisiana contract it follows that **all Louisiana statutes governing its delivery and acceptance in Louisiana are deemed to be** written into it and become a part of it.[31] This is true of the Louisiana direct action statute [32] under which this suit was brought, and it is likewise true of the process statutes [33] which governed the delivery of the policy to the insured in Louisiana.

The question is therefore, did Louisiana have the constitutional right under its police power to regulate the delivery of this policy in the state to a Louisiana citizen, affecting the use of property situated in Louisiana, by requiring respondent to appoint the secretary of state as its agent for service of process in a suit on a cause of action arising under the policy.

It is submitted that there is no distinction between the essential nature of the regulation which resulted from such a requirement and the regulation which is imposed by the nonresident motorist statutes and by the Mississippi statute which was construed by the court below in *Sugg* v. *Hendrix*, 142 Fed. 2d 740 (1940).

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[31] *Johnson* v. *Anderson-Dunham Concrete Co.*, 212 La. 276, 31 So. 2d 797 (1947).

[32] *Dean* v. *Bituminous Casualty Corp.*, 72 Fed. Supp. 801 (1947).

[33] This Court said of a similar process statute in *Hunter* v. *Mutual Reserve Life Insurance Co.*, 218 U. S. 573, 583 (1910): "* * * It (the foreign insurer) had done business in the State and the former (process) act became part of its obligations to the policy holders. * * *"

The motorist process statutes are justified on the ground of regulation by a state under its police power but they regulate only to the extent that they afford a remedy to a citizen of the state of the forum to sue in the courts of that state and acquire jurisdiction therein over the non-resident motorist,—corporate or individual,—by substituted process. Insofar as the health, safety and morals of the residents of the state of the forum are concerned, the manner of the use of the highways by the non-resident motorist is not affected by the substituted service of process statutes. The use of the highways is governed by the existing laws of the state which directly regulate the manner of operation of vehicles on the highways, in the same way by residents and non-residents alike. Such motorist process statutes, therefore, don't protect the health, morals or safety of the residents of the state but **they do affect the general welfare** [34] of the citizens of the state which it is **the duty of the state to promote under the police power.**

The same thing is true of the Mississippi statute, the validity of which was upheld by the court below in the *Sugg* case. That statute didn't regulate the conduct of the individual non-resident defendant in the State of Mississippi so as to protect the health, safety or morals of the Mississippi plaintiff or his fellow citizens. The statute simply afforded to Mississippi citizens the right to sue in Mississippi courts non-residents performing "any character of work or service" in Mississippi by substituted service of process. Like the non-resident motorist statutes, this statute was justified as being regulatory under the police power, but the regulation was in the interest of the **general welfare** of the citizens of Mississippi whose right to use, as against a non-resident defendant, the substituted process

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[34] See the language of the court in the *White* case approving process under Act 279 of 1918 and 105 of 1898, Appendix, p. 42, 43.

afforded by the statute was recognized and enforced. The statute contained no mandate or prohibition affecting the health, safety or morals of Mississippi citizens.

The truth of the matter is that the **sole purpose of such a statute**, and its **only effect, is to provide a convenient forum** to the citizens of a state which enacts it and this also is its justification. In *Hess* v. *Pawloski*, 284 U. S. 352 (1927) this court, in upholding it, said of the motorist statute under consideration:

> "* * * The measure in question operates **to require** a non-resident **to answer** for his conduct in the state **where arise causes of action** alleged against him, as well as **to provide** for a claimant a **convenient method** by which he may sue to enforce his rights. * * *"

In the same way and to the same extent a statute providing for substituted service of process on a foreign insurer which issues or delivers a policy in the state of the forum to one of its citizens is a regulation of that activity of the insurer across state lines in order to provide, in the public interest, a convenient forum for suit against the insurer on an obligation growing out of that transaction in the state of the forum. And if it be said that the nature of the activity which is affected by the regulation is important in determining the power of the state to impose it, it will be remembered that the business of insurance, the primary function of which is to issue and deliver policies, has been declared by this Court to be affected with "a vast public interest,[35] and therefore subject to regulation by the states under the police power."[36] This right has also been expressly declared by federal statute.[37]

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[35] *Prudential Insurance Co.* v. *Benjamin, supra.*

[36] *California State Auto Association Inter-insurance Bureau* v. *Maloney*, 341 U. S. 105 (1951).

[37] The McCarran Act, 59 Statutes 33, 15 U.S.C. secs. 1011-1015.

There is no doubt that under the Louisiana non-resident motorist statute if respondent had negligently killed the decedent by the operation of an automobile on a Louisiana highway plaintiff could have sued it in that state by substituted service of process regardless of whether it had ever delivered an insurance policy there. Why, then, from a constitutional viewpoint, should she not be able to sue respondent in Louisiana by substituted service on an obligation arising under a policy delivered within the state, if the process is available by virtue of the regulatory effect of a statute enacted to afford a convenient forum?

Since we are now discussing only the effect of the delivery by respondent of the policy herein sued on under a statute providing for service of process upon the secretary of state as respondent's agent under the statute, and the constitutional validity of such a statute, we think it appropriate to refer to the language of Mr. Justice Douglas in his concurring opinion in *Travelers Health Association* v. *Virginia, supra.* He said at page 654:

> "• • • The requirements of due process may demand more or less minimal contacts than are present here, depending on what the pinch of the decision is or what it requires of the foreign corporation."

And in connection with that statement Mr. Justice Douglas referred with approval to an excerpt from this language [38] by the late Mr. Justice Rutledge developing the significance and implications of the philosophy of *Hess* v. *Pawloski, supra:*

> "• • • But the non-resident motorists' statutes, which are applicable to foreign corporations and the fact that they have been so widely enacted and sustained, show two things among others. The first, like

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[38] *Frene* v. *Louisville Cement Co.*, 134 Fed. 2d 511 (1943).

the cases sustaining jurisdiction upon a basis of 'solicitation plus', is that contracting, actually or continuously, is not essential for jurisdictional purposes, nor is negotiation, solicitation, or other activity looking toward the formation of contracts. The second is that some **casual or even single acts** done within the borders of the sovereignty may **confer power to acquire jurisdiction of the person,** provided there is also reasonable provision for givng notice of the suit in accordance with minimal due process requirements. Other instances may be noted. Old notions concerning want of power over nonresident partners and partnerships have been modified or discarded. New forms of service have been invented and sustained. In general **the trend** has been toward a **wider assertion of power over nonresidents and foreign corporations** than was considered permissible when the tradition about 'mere solicitaton' grew up."

It would seem clear, therefore, that under the jurisprudence of this court and by federal statute Louisiana had the right under its police power to require respondent to appoint the secretary of state as its agent for service of process in connection with obligations arising in Louisiana out of the policy sued on as a condition to the delivery of the policy in the state.

2

**Jurisdiction Resulting from Continuing Relationship, Contacts and Ties**

If it should be held that Louisiana didn't acquire jurisdiction over respondent's person as a consequence of the simple delivery of the policy sued on petitioner contends that this transaction, taken together with other related factors, had the effect of establishing such continuing relationships and constituted such a contact or tie within the State of Louisiana as to give the trial court below jurisdic-

tion under the service of process statutes which are discussed hereinafter.

The following factors, we believe, when considered collectively in the light of the recent jurisprudence of this tribunal, clearly show that the trial court was vested with jurisdiction over respondent's person: the policy sued on was a Louisiana contract governed by its laws; **the contract affected the use of property in the dangerous "business operations" of the insured public utility company** in Louisiana; (R. 24); the insured was a citizen of Louisiana; under the Louisiana direct action statute [39] which is deemed to have been written into the policy as a Louisiana contract,[40] not only petitioner but **every citizen of the state** had a right to sue respondent directly on a cause of action which might arise in his favor under the policy and within its coverage; there was **no limit to the number of accidents covered by the policy**; the obligation here sued on grew out of the policy **contracted by respondent in Louisiana**; respondent had broad rights under the policy to **inspect the insured's physical plant** and **examine its books** which would require it, and permit it, to go into Louisiana to exercise them; respondent's contacts or ties within the state had been kept in force by it through a series of contracts **continuously for a period of four and one-half years**; the Louisiana court was a **convenient forum** in which to try this case both for plaintiff and **for respondent** because plaintiff lived within its jurisdiction and **all the witnesses lived there where the accident happened**, whereas the courts of the state of New York, which was the domicile of respondent, were, for practical purposes, **inaccessible to plaintiff**; the character and method of process and service of process were **reasonable and effective** as is evidenced by the fact that respondent actually thrice received copies of the process and notice of

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[39] Act 55 of 1930, Appendix, p. 42.

[40] *Dean* v. *Bituminous Casualty Corp., supra.*

the suit as a result of the execution of the statutory provisions (R. 14, 38-41); and, finally, respondent had knowledge of the laws of Louisiana by virtue of having been previously qualified to do business there.

In the landmark case of *International Shoe Company v. Washington, supra,* this court, in determining the question of what activity within a state by a foreign corporation is necessary to subject the foreign corporation to the jurisdiction of the court of the forum, discarded the requirements of "doing business" as established by the old definitions and substituted less abstract and more realistic requirements. The fact that the defendant foreign corporation in that case was not qualified in the state of the forum, maintained no office or agents with power to contract there, and had appointed no agent for service of process in that state, did not prevent the corporation from becoming amenable to the jurisdiction of the courts of the forum. The test adopted was whether a continuous relationship had been established by the foreign corporation through contacts and ties within the state of the forum so as to make it consonant with "our traditional notions of fair play and substantial justice" to permit the state of the forum to enforce obligations which the foreign corporation had incurred in that state. The *ratio decidendi* of this court in that case may be summarized in these excerpts from the opinion:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U. S. 714-733. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have

certain **minimum contacts** with it such that the maintenance of the suit does not offend **'traditional notions of fair play and substantial justice'.**

* * * * * * *

"'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been **continuous** and systematic, but also **give rise to the liabilities sued on,** even though no consent to be sued or authorization to an agent to accept service of process has been given."

* * * * * * *

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or **quantitative.** The test is not merely, as has sometimes been suggested, whether **the activity,** which the corporation has seen fit to procure through its agents in another state, **is a little more or a little less.** * * * Whether due process is satisfied must depend rather upon the **quality** and **nature** of the **activity** in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. * * *"

* * * * * * *

"* * * It is evident that these operations establish sufficient **contacts or ties** with the state of the forum to make it **reasonable** and **just,** according to our **traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there.** Hence we cannot say that the maintenance of the present suit in the State of Washington involves an **unreasonable or undue procedure.**"

Quite recently Your Honors have applied and extended the doctrine of the *International Shoe Company* case in

*Travelers Health Association* v. *Virginia, supra.* In the *Virginia* case a Nebraska insurer which was not authorized to do business in Virginia, maintained no office or agents there and had appointed no agent for service of process there, was selling insurance certificates to Virginia residents through the mails in violation of Virginia's "Blue Sky Law". Virginia obtained a judgment ordering the foreign insurer to cease and desist from selling such certificates to its citizens through the mails until the foreign insurer had complied with the requirements of the Virginia law. Process was served on the foreign insurer through the secretary of state and the insurer attacked the process as being in violation of the constitutional requirements of due process. The state court upheld the process and on appeal this Court affirmed.

After quoting from the opinion in the *International Shoe Company* case Your Honor Justice Black set forth the considerations which controlled the decision in the *Virginia* case.

He said:

> "• • • Instead we accorded 'great weight' to the 'consequences' of the **contractual obligations** in the state where the insured resided and the 'degree of interest' that state had in seeing that those obligations were faithfully carried out. • • •"
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> • • • • • • •
>
> "Measured by the principles of the Osborn, Hoopeston and International Shoe cases, the **contacts and ties** of appellants with Virginia residents, **together with that state's interest in faithful observance of the certificate obligations,** justify subjecting appellants to cease and desist proceedings under sec. 6. • • •"
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> • • • • • • •
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> "Moreover, if Virginia is without power to require this Association to accept service of process on the

Secretary of the Commonwealth, the **only forum** for injured certificate holders might be Nebraska. Health benefit claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska law suit. In addition, suits on alleged losses can be **more conveniently tried** in Virginia **where witnesses would most likely live and where claims for losses would presumably be investigated.** Such factors have been given great weight in applying the doctrine of forum non conveniens. See Gulf Oil Co. v. Bilbert, 330 U. S. 501, 508. And prior decisions of this Court have referred to the **unwisdom, unfairness** and **injustice** of permitting policyholders to **seek redress only in some distant state where the insurer is incorporated. The Due Process Clause does not forbid a state to protect its citizens from SUCH INJUSTICE.**"

A distinction has been suggested, however, between "private suits" and "regulatory suits," on the ground that the requirements for due process in acquiring jurisdiction over the person of a non-resident corporation are narrower in the so-called regulatory suits than they are in private suits. We know of no valid distinction as to jurisdictional and process requirements between a suit brought by a state and a suit brought by a citizen against a foreign corporation under the Fourteenth Amendment to the United States Constitution. Rationally it would seem that process can't be "due" under the constitution against the non-resident defendant corporation in a suit brought by a state and not "due" in a suit brought by an individual citizen of the state against the non-resident defendant when the latter's activity, contacts and ties are the same in each case. As we understand it, jurisdiction over the person of the non-resident corporation is determined not by the character of the plaintiff's legal entity or the nature or purpose of the suit, but upon **what the defendant has done within the state of the forum** to make itself amenable to process under the Due Process Clause of the Fourteenth Amendment. We

quote from Barron & Holtzoff, Federal Practice & Procedure Vol. I, sec. 179, page 314, N. 93:

> "* * * It would seem that an action by a private person against the same corporation would have had the same results, provided the obligation sued on was as closely related to the transaction of business by the corporation in the state as the tax in the International Shoe Co. case."

It would appear, therefore, that under the facts of this case and the jurisprudence as represented by the *International Shoe Company* case and *Travelers* v. *Virginia* respondent by its activity in Louisiana before and after the delivery of the policy sued on had maintained such a continuing relationship, contact, or tie in Louisiana as to confer on the trial court jurisdiction over its person.

3

**Jurisdiction Because of Doing Business**

Petitioner also contends that as a result of its dealings in Louisiana from January 1, 1944, to June 3, 1948, respondent was transacting business in Louisiana within the definition of both of the statutes under which it was served.

As pointed out above, this court in the *International Shoe Company* case held that jurisdiction was acquired by the state of the forum over the defendant non-resident corporation because, although it hadn't fulfilled the old requirements for "doing business", its activity within that state was sufficient to make it consonant with our "traditional notions of fair play and substantial justice" for the state to require it to answer in its courts for obligations incurred there as a result of that activity.

But in *Hoopeston Canning Company et al.* v. *Cullen*, 318 U. S. 313 (1943), which was decided shortly before the

*International Shoe Company* case, this court had modified the definition of doing business under a New York statute. There again, though the contracts were made outside of the state of the forum, Your Honors held that the non-resident corporation was "doing business" within the meaning of the substituted service of process statute under examination. In reaching this conclusion Your Honors adopted and applied three tests which were stated in these words by Mr. Justice Black:

> "We conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract, Osborn v. Ozlin, supra, of the degree of interest of the regulating state in the object insured, and of the location of the property insured are separately and collectively of great weight. Applying any of these tests, it is apparent that the reciprocals are doing business in New York and are thereby subject to regulation by that state."

We have shown above (1) the character of respondent's business dealings in Louisiana from January 1, 1944, to June 10, 1946, the date of this Louisiana contract, and from the date of the contract to June 3, 1948, when the last of the series of contracts of which it was a part was finally cancelled, (2) that Louisiana had an interest in seeing that respondent should answer to her citizens in her courts on obligations growing out of respondent's Louisiana contracts and, (3) that the risk insured against was liability resulting from the operation of the insured's public utility plants in Louisiana. The importance of the location of this property in Louisiana was noted in the opinion in the *Hoopeston* case by Mr. Justice Black in these words:

> "The intimacy of the relation of these insurance contracts to the state of New York becomes even more

apparent when it is remembered that the property insured is in the State of New York."

It is submitted that respondent was doing business in Louisiana for the purpose of conferring jurisdiction on the trial court below. That was the conclusion of two federal district court judges who have had occasion to interpret and apply the *International Shoe Company* case and *Travelers* v. *Virginia,* in cases[41] much like the case at bar.

4

**Process under Act 179 of 1918** [42]

The Court of Appeals stated that petitioner contended "that both with and without the benefit of the statutory aid she invokes, the service of process on Excess (respondent) was good, the jurisdiction of its person was present." As appears above, petitioner does vigorously contend that **jurisdiction** was present without the aid of the invoked statutes, but the court below erred when it stated that petitioner contended also that **process** was good without those statutes. Petitioner contends, however, that process was patently good under the invoked statutes.

**(a) By Virtue of Act 105 of 1898**

After respondent's motion was filed petitioner had it carefully served with process under Louisiana Act 179 of 1918, sec. 1, subdiv. (6), par. (c),[43] (R. 31-34, 40, 41). Respondent has never contended that the procedural requirements of that statute were not complied with. It will be

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[41] *Storey* v. *United Insurance Co.,* 64 Fed. Supp. 896 (1946); *Ace Grain Co., Inc.,* v. *American Eagle Fire Insurance Co. of New York, et al.,* 95 Fed. Supp. 784 (1951).

[42] Appendix, p. 38.

[43] Appendix, p. 43.

noted, however, that the procedure provided by that law is applicable only to a foreign corporation which was "required by law" to appoint an agent for service of process, but sec. 1 of Art. II of Act 105 of 1898 [44] made such a requirement. It provided that no foreign corporation should "issue policies, take risks or transact business in this state," without appointing the secretary of state as its agent for service of process in any action or proceeding against it in Louisiana.

In *White* v. *Indiana Travelers Assurance Company*, 22 So. 2d 137 (1945), it was **SQUARELY HELD** by the Louisiana Court of Appeal that Act 105 of 1898 **required** a foreign corporation **to appoint** an agent for service of process **within the meaning** of Act 179 of 1918, and **THAT SERVICE UNDER THOSE TWO STATUTES AGAINST THE DEFENDANT UNAUTHORIZED FOREIGN INSURER WHICH WAS NOT DOING BUSINESS IN THE STATE WAS GOOD.**

But the 1898 Act was repealed by Act 195 of 1948,[45] and the court below held that, as a result, service under the 1918 Act was invalid. The answer is that the 1898 Act was in force **when the policy sued on was delivered in Louisiana,** as well as when the cause of action herein asserted accrued on September 20, 1947, and when the suit was filed on September 17, 1948, and that the terms and provisions of that act must, therefore, be **considered as having been written into the policy as a part thereof.** And, besides requiring respondent to appoint the secretary of state as its agent for service of process, the section of the statute in question provided as follows:

> "• • • Said power of attorney **shall stipulate"** on the part of the foreign insurer that the authority

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[44] Appendix, pp. 38, 39.

[45] Appendix, p. 41.

> of the secretary of state to receive service of process **"shall continue in force so long as any policy, or other liability remains outstanding against"** the foreign insurer in the state.

That language is plain enough and has been applied by Louisiana's court of last resort in accordance with its literal meaning. The holding in the case of *The Flair, Ltd.* v. *American Fire Insurance Company, et al.*, 135 La. 48, 64 So. 977 (1914), was synopsized by Louisiana's court of last resort in the headnote thus:

> "The mandate of the Secretary of State to represent foreign insurance companies in the State of Louisiana for the purpose of the service of citation or other lawful process **continued in force so long as any policy or other liability, remains outstanding against the corporation in this state.** Act No. 105 of 1898."

And this Court has had occasion to recognize the binding effect of similar statutes of other states. In *Provident Savings Association* v. *Kentucky*, 239 U. S. 103, 114 (1915), this Court in reviewing its holdings in previous cases, said:

> "• • • The cases cited related to the validity of the service of process upon foreign corporations. And it was held that a foreign insurance corporation which had transacted business within the jurisdiction of a State continued, notwithstanding its withdrawal from the state, to be subject to service of process within the State, in actions arising out of the business so transacted, **where the service was made in accordance with the conditions upon which the business was permitted to be done.** • • •"

Since respondent's liability under the policy sued on was still "outstanding" at the time of service it is beyond argument that the authority of the secretary of state to receive service as respondent's process agent was still in force under Act 105 of 1898 and the process was good under the

decisions in the *White* case and in *The Flair, Ltd.*, case. The decision of the court below on this important question of local law was acordingly in direct conflict with the only two applicable local decisions.

5

**(b) By virtue of Act 195 of 1948, Sec. 21.05**

But even if the process had been invalid under Act 179 of 1918 because of the repeal of Act 105 of 1898, in spite of the fact that it was legally stipulated in the policy under the 1898 Act that the appointment of the secretary of state by respondent as its agent for service of process should continue so long as the policy remained outstanding against respondent in Louisiana, process would still have been good by virtue of Sec. 21.05 of Act 195 of 1948, the Louisiana Insurance Code which repealed Act 105 of 1898.

That law [46] provides that every foreign insurer shall appoint the secretary of state as its agent for service of process and that the appointment shall continue in force so long as any contract in this state shall remain outstanding. This statutory provision became effective simultaneously with the repeal of Act 105 of 1898 on October 1, 1948, and plainly "required" respondent to appoint the secretary of state as its process agent within the meaning of Act 179 of 1918, Sec. 1, subdiv. (6), par. (c). Yet **WITHOUT GIVING ANY REASON** the court below reversed the trial judge and held that the process was invalid because Act 105 of 1898 had been repealed and "no equivalent statute had been re-enacted to take its place."

By completely overlooking this obviously applicable and unambiguous statute the court below failed egregiously to give a Louisiana citizen the benefit of Louisiana law and dispensed injustice as a consequence.

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[46] Appendix, p. 39.

**Process under Act 195 of 1948, Sec. 27.03 (b) by Virtue of Sec. 27.03 (a)**

At the same time that petitioner made service on respondent through the secretary of state under Act 179 of 1918, because of the requirements of Act 105 of 1898 she also, out of an abundance of precaution, had respondent served through the secretary of state under par. (b)[47] of Sec. 5 of Act 159 of 1940 because of the statutory appointment of the secretary of state under par. (a) [48] of Sec. 5 of that act which resulted from the delivery of the policy as well as from the transaction of business in the state. If the validity of process on respondent must, as we contend, be determined by reference to statutes which were in force on June 10, 1946, the effective date of the policy, and on September 20, 1947, the date the cause of action accrued, then since process was good under Act 179 of 1918 by virtue of Act 105 of 1898, service under 159 of 1940 was surplusage and the question of the validity of that service is immaterial.

If, on the other hand, it should be thought that, contrary to local authority [49] and the jurisprudence of this Court [50] on the subject, the question of the validity of the process must be decided under the law existing at the time of the service of process on defendant in May, 1949 (R. 38-41), then the service was still good under Act 179 of 1918 because of the requirement of Sec. 21.05 of Act 195 of 1948.

And, finally, if it should be believed that, in spite of the Louisiana jurisprudence and the jurisprudence of this Court to the contrary, the court below was correct in nullify-

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[47] Appendix, pp. 41, 42.

[48] Appendix, p. 41.

[49] *The Flair, Ltd.*, v. *American Fire Insurance Co. et al., supra.*

[50] *Provident Savings Association* v. *Kentucky, supra.*

ing process under Act 179 of 1918 on the ground that neither Act 105 of 1898 nor Sec. 21.05 of Act 195 of 1948 was applicable, then petitioner submits that process was good on respondent under Sec. 27.03(b) of Act 195 of 1948 because of the provisions of Sec. 27.03(a) of that act.

Paragraphs (a) and (b) of Sec. 27.03 of Act 195 of 1948 [51] are re-enactments in substantially identical form of pars. (a) and (b) of Sec. 5 of Act 159 of 1940,[52] which latter act was repealed by the former. Of course, if respondent was transacting business in Louisiana the process was indisputably good under either or both of such statutes. Also, if the delivery of the policy under those stautes was equivalent to the appointment of the secretary of state as process agent, though respondent was not otherwise doing business in Louisiana, the process was good beyond question. But the court below held that respondent was not doing business in Louisiana, and, on the authority of *White* v. *Indiana Travelers Assurance Company, supra,* held that par. (a) of sec. 5 of Act 159 of 1940 applied only to foreign insurers which were transacting business in the state. Conceding, then, for the sake of argument that the validity of the process depends upon the applicability of the law prevailing at the date of service (May, 1949) instead of at the date of delivery of the policy, petitioner contends that process was still good.

It will be noted that process was served on respondent conformably to pars. (a) and (b) of sec. 27.03 of Act 195 of 1948, sec. (a) of which reads in part as follows:

> "The transacting of business in this state by a foreign or alien insurer without a certificate of authority and the issuance or delivery by such foreign or

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[51] Appendix, p. 40.

[52] Appendix, pp. 41, 42.

> alien insurer of a policy or contract of insurance to a citizen of this state * * * is equivalent to an appointment by such insurer of the secretary of state * * * to be its true and lawful attorney, * * *."

Now that provision has never been construed except by the court below. It is true that the same provision of Act 159 of 1940 was construed in the *White* case but that construction is obviously inapplicable to the 1948 act. In the *White* case the court said that the language just quoted was in itself ambiguous, that it was doubtful whether either the transacting of business or the simple delivery of a policy is equivalent to the appointment of the secretary of state as statutory agent, or whether only the transaction of business plus the delivery of a policy is the equivalent. The court said that it was not necessary to determine whether the word "and" after the word "authority" in the third line of the language quoted above was used in the conjunctive or disjunctive sense because a reference to the title of the act left no doubt that the act applied only to foreign insurers which were transacting business in Louisiana. The court said reluctantly:

> "In view of the specific and definite wording employed in the title, we can only hold that the act applies solely to insurers who are transacting business in the state without authority."

But Act 159 of 1940, including its title, was repealed by Act 195 of 1948,[53] and, though pars. (a) and (b) of sec. 5 of the former act were reenacted by the latter as pars. (a) and (b) of sec. 27.03 of the latter act, the title of the former act was not reenacted. It therefore follows that the construction of the 1940 statute in the *White* case is not authority for a construction of the 1948 statute which called for

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[53] Appendix, p. 41.

an original and independent construction by the court below. Indeed, in view of the effect given to the title of the 1940 Act in the *White* case and the subsequent repeal of the title, if that decision is to be considered at all in construing the 1948 Act, it can only be assumed that in reenacting the body of the 1940 Act without the title, the legislature intended to change the result [54] reached in the *White* case.

If the 1948 Act is construed without reference to the result reached in the *White* case, several pertinent rules of statutory construction combine to compel the conclusion that the intention of the legislature in enacting par. (a) of Sec. 27.03 of Act 195 of 1948, was to make the simple delivery of a policy in Louisiana to a Louisiana citizen by an unauthorized foreign insurer, as well as broader business activity, the equivalent of an appointment of the secretary of state as agent for service of process.

For fifty years from 1898 to 1948 when Act 105 of 1898 was repealed by Act 195 of 1948, it was the unbroken policy of the State of Louisiana to require unauthorized foreign insurers to appoint the secretary of state as agent for service of process in Louisiana before issuing a policy or taking a risk in the state even if they were not otherwise transacting business in the state. But if par. (a) of sec. 27.03 of Act 195 of 1948 should be construed to apply only to unauthorized insurers which are transacting business in the state, and if sec. 21.05 of Act 195 of 1948 does not require an unlicensed foreign insurer to appoint the secretary of state as its agent for service of process, then it must have

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[54] "The jurisprudence is well-settled that, even when a statute (particularly one which has been interpreted by the courts) is amended, and the wording of the act is altered, the Legislature intended to change the former law on the subject." *Hibernia National Bank* v. *Louisiana Tax Commission et al.*, 195 La. 43, 196 So. 15 (1940).

been the intention of the legislature to discard the policy of fifty years which required the appointment of the secretary of state as process agent upon the simple delivery of a policy in the state. But the trend is the other way so it should not be supposed[55] that the Louisiana legislature intended **to withdraw from its citizens the benefit of this long established and needed protection against unauthorized foreign insurers** when it adopted the Insurance Code in 1948 for the purpose therein announced.[56]

Another rule of construction which prevails in Louisiana as well as elsewhere, is to the effect that an interpretation should be adopted which will give meaning to every clause, sentence and word in a statute.[57] But if the provision in question is construed to apply only to insurers which are transacting business then the clause referring to the effect of the delivery of a policy in the state is absolutely meaningless because the transaction of business includes the delivery of a policy. Surely it wasn't the intention of the legislature to make the transaction of business **plus** the delivery of a policy equivalent to an appointment of a process agent but to exempt the transaction of business unaccompanied by the delivery of a policy from the same legal consequence.

The word "and" which is under discussion was obviously used in the sense of the word "or" and should be so inter-

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[55] 50 Am. Jur., Statutes, sec, 299, p. 280.

[56] "Insurance is a business affected by the public interest and it is the purpose of this Code to regulate that business in ALL ITS PHASES."—Act 195 of 1948, sec. 102.

[57] "It is a recognized rule of statutory construction that the act as a whole ought to be interpreted so that no clause, sentence, or word shall be superfluous, or meaningless, if that result can be avoided." *Hibernia National Bank* v. *Louisiana Tax Commission et al*, *supra*.

preted to effectuate the obvious intention of the legislature.[58]

The *White* case is certainly not authority for the construction of Act 195 of 1948 by the court below and there can be little doubt that if the court in the *White* case had been construing the statute before it without the compulsive language of the title to the act it would have reached a different conclusion.

The decision of the court below should be reviewed because it erroneously decided important federal questions that have never been passed upon but should be settled by this court, and because the court below has misinterpreted and misapplied local decisions and disregarded applicable statutes in arbitrary and ill-considered fashion in deciding an important question of local law contrary to Louisiana jurisprudence.

Respectfully submitted,

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[58] *Bradford* v. *Louisiana Public Service Commission*, 189 Louisiana 327, 179 So. 442 (1938); 50 American Jurisprudence, Statutes, sec. 282, p. 267.

## APPENDIX

**Act 179 of 1918,**

Sec. 1, Subdivision (6), par. (c):

"If the (foreign) corporation, being one **required by law** to appoint and maintain an agent for service of process, has failed so to do, or such agent, if appointed, cannot be found, and said corporation has not established and maintained an office in the State, the officer charged with the duty of making the service, shall, after diligent effort, make return to the court, stating the efforts made by him to secure service, and the reasons for his failure so to do, and thereafter, the Judge, or in the event of his absence from the parish, the clerk, shall order service to be made on the Secretary of State, whose duty it shall be forthwith, to send, by registered mail, addressed to the corporation at its last known domiciliary post office address, the originals of the papers served upon them retaining in his office true copies thereof, upon which he shall note the date, the manner and other particulars of the service, and of the disposition of the originals; * * *"

**Act 105 of 1898,**

Art. II, Sec. I:

"Be it further enacted, etc., That, no Insurance company, corporation, association or society **organized under the laws of any State** in the United States, or any foreign country shall directly or indirectly **issue policies, take risks or transact business in this State,** until it shall have **first appointed in writing the Secretary of State of this State to be the true and lawful attorney of such company,** corporation, association or society, in and for this State upon whom all lawful process in any action or proceeding against the company, corporation, association or society may be served with the same effect as if the company, corporation, association or society existed in this State. Said power of attorney **shall stipulate** and **agree** on the part of the

company, corporation, association or society that any lawful process against the same, which is served on said attorney shall be of the same legal force and validity as if served on the company, corporation, association or society, **AND THAT THE AUTHORITY (TO RECEIVE SERVICE) SHALL CONTINUE IN FORCE SO LONG AS ANY POLICY, OR OTHER LIABILITY REMAINS OUTSTANDING AGAINST THE COMPANY, CORPORATION, ASSOCIATION OR SOCIETY IN THIS STATE.** A certificate of such appointment, duly certified and authenticated, shall be filed in the office of the Secretary of State and copies certified by him shall be deemed sufficient evidence. Service upon such attorney shall be deemed sufficient service upon the principal. * * *" (Parenthesis supplied.)

**Act 195 of 1948,**

Sec. 21.05:

"**Every foreign** or alien **insurer shall appoint** the Secretary of State to be its true and **lawful attorney in this state** upon whom, or some other person in his office during his absence he may designate, **all lawful process** in any action or proceeding against such insurer **may be served,** which **shall constitute service on such insurer.** Such appointment **shall continue** in force so long as **any contract** or other liability of such insurer in **this State** shall **remain outstanding.** Whenever such process shall be served upon the Secretary of State he shall forthwith forward a copy of the process by prepaid registered mail to the person designated for the purpose by the insurer."

Sec. 27.03 (a):

"The **transacting of business** in this State by a foreign or alien insurer without a certificate of authority and the **issuance or delivery by such foreign or alien insurer of a policy or contract of insurance to a citizen of this State** or to a resident thereof, or to a corporation authorized to do business therein, **is equiva-**

lent to an appointment by such insurer of the Secretary of State and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding arising out of such policy or contract of insurance, and the said issuance or delivery is a signification of its agreement that any such service is of the same legal force and validity as personal service of process in this State upon it."

Sec. 27.03 (b):

"Such service of process shall be made by delivering and leaving with the Secretary of State or with some person in apparent charge of his office two copies thereof and the payment to him of such fees as may be prescribed by law. The Secretary of State shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed and the affidavit of the plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow. However, no plaintiff or complainant shall be entitled to a judgment by default, or a judgment with leave to prove damages, or a judgment pro confesso under this section until the expiration of thirty (30) days from date of the filing of the affidavit of compliance."

Section 31.11—**"Effective Date.**

"The provisions of Chapter 30 of this Code (secs. 30.10-30.22) shall go into effect at 12:00 noon on the twentieth day after the Legislature shall have adjourned. All other chapters shall become effective at 12:00 noon on the first day of October, 1948."

Section 32.01—**"Acts Repealed.**

"The following Acts are hereby repealed: **Act 105 of 1898, as amended; * * * Act 159 of 1940; * * *"**

**Act 159 of 1940,**

Sec. 5, par. (a):

"That the **transacting of business** in this state by a foreign or alien insurer without a certificate of authority and the **issuance or delivery by such foreign or alien insurer of a policy or contract of insurance to a citizen of this state** or to a resident thereof or to a corporation authorized to do business therein, **is equivalent to an appointment by such insurer** of the Secretary of State and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding arising out of such policy or contract of insurance, and the said issuance or delivery is a signification of its agreement that any such service of process is of the same legal force and validity as personal service of process in this state upon it."

Sec. 5, par. (b):

"Such **service of process shall be made** by delivering and leaving with the Secretary of State or to some person in apparent charge of his office two copies thereof and the payment to him of such fees as may be prescribed by law. The Secretary of State shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place

of business, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow. However, no plaintiff or complainant shall be entitled to a **judgment by default**, or a **judgment pro confesso** under this section **until the** expiration of thirty days from date of the filing of the affidavit of compliance."

**Act 55 of 1930,**

Sec. 1:

"That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect * * *. Provided further that the insured person or his or her heirs, at their option, **shall have a right of direct action** against the insurance company within the terms, and limits of the policy, * * *."

White v. Indiana Travelers Assurance Co., supra:

"We cannot refrain from the suggestion that the effect of the law prescribing a method of citation and service of process is **most salutary** and is **highly desirable in the protection of the General Welfare of citizens and residents of the State of Louisiana.** To us it seems no more than right and just that any company which derives the benefits flowing from the issuance of policies of insurance to citizens or residents of a

state **should subject itself to the jurisdiction** of the Courts of that State. **To admit of an interpretation** which would necessitate the assumption of a **burdensome expense and inconvenience** by a policyholder in an attempt to enforce a claim against a foreign insurer would be **incompatible with principles of common equity and right** as between the parties to **the transaction.**" —White v. Indiana Travelers Assurance Co., supra.

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# Supreme Court of the United States

October Term, 1951.

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## No. 319

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**MRS. BEULAH FISHER LEJEUNE, Individually and as Tutrix for her Minor Children,**

**Petitioner,**

**versus**

**EXCESS INSURANCE COMPANY OF AMERICA,**

**Respondent,**

---

## BRIEF ON BEHALF OF EXCESS INSURANCE COMPANY OF AMERICA, RESPONDENT.

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MOSES C. SCHARFF,
H. L. HAMMETT,
Counsel for Respondent.

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**SUPREME COURT OF THE UNITED STATES**

**October Term, 1951.**

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**EXCESS INSURANCE COMPANY OF AMERICA,**
**Respondent,**

---

# BRIEF ON BEHALF OF EXCESS INSURANCE COMPANY OF AMERICA, RESPONDENT.

---

*MAY IT PLEASE THE COURT:*

## REASONS WHY WRIT SHOULD NOT BE GRANTED.

No questions are presented by this case which would warrant a review by your Honors, because:

(1) No important questions of general or local law were decided by the Court below; the decision embraces only questions of statutory construction of state process statutes.

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(2) The Court below did not even question the validity of any state statutes; it conceded such validity, though it decided one state statute had been repealed.

(3) The only pertinent state Court decision was not disregarded, but was exactly followed.

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## STATEMENT OF FACTS.

This suit was a direct action against insurers in the Federal Court for the Western District of Louisiana. As such, it was governed by Section 1391, paragraph (c) Title 28 U. S. C., which reads as follows:

> A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Since respondent was a New York corporation and was not licensed to do business in Louisiana, and since it was stipulated that respondent had no office or agent in Louisiana and that there was no person authorized to accept service on its behalf in that state, petitioner had recourse to two Louisiana statutes under the provisions of Rule 4 of the Rules of Civil Procedure and particularly paragraph 7* thereof. The

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* Paragraph 7 reads: "(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in any action brought in the courts of general jurisdiction of the state.

first statute (Act 159 of 1940) prescribed service as to insurers "transacting business" in Louisiana. However this Act was held in the Louisiana case of *White vs. Indiana Travelers Assurance Co.*, 22 So. (2nd) 137, as being not applicable to an insurance company which had merely issued a policy to a Louisiana resident because, as the Court held, the mere issuance of a policy was not the transaction of business and the Act required the "transacting of business" in order to render service under it proper. The Louisiana court, however, pointed out that there was another Act; namely, 105 of 1898 under which the mere issuance of a policy was sufficient to subject the insurance company to service upon the Secretary of State. When this case was called to the attention of the District Court in the argument on motions to dismiss, petitioner's counsel moved to have service made under the specific provisions of this second Act (105 of 1898.*) While the Act of 1898 did require an insurance company which issues policies, to appoint the Secretary of State as agent for services of process, it did not provide any method of service and hence the General Service Act (179 of 1918) which authorized service upon the Secretary of State where a corporation required by law "to appoint and *maintain* an agent for service of process has failed to do so", was additionally invoked.

* The motion read in part, "Excess was required by Section 1 of Article II of Act 105 of 1898, to appoint 'in writing, the Secretary of State to be the true and the lawful attorney * * * upon whom all lawful process' might be served upon it in any action or proceeding against it and since Excess has failed to appoint the Secretary of State as its agent for service of process as required by said statute, the method of service of process upon it in this suit is provided by subdivision (c) of paragraph (6) of Section 1 of Act 179 of 1918, etc." The Act of 1898 referred to in this motion was the repealed Act.

## ARGUMENT.

When the second service was attempted under specific provisions of the Act of 1898, the Act had already been repealed and no equivalent legislation, as the Court of Appeals decided, had been enacted. On the contrary, the substituted statute (Louisiana Insurance Code, Act 195 of 1948, Section 27.03) used the identical language of the Act of 1940 which *White vs. Indiana Travelers* had held required the transacting of business in this state as well as the mere issuance of a policy. A strenuous effort was made in the Court of Appeal to show that regardless of the fact that, as petitioner admitted, the substituted statute used the identical language of the Act of 1940 which the Louisiana Court had held required the transaction of business, the new Act did not in fact mean what it plainly said and that the new Act should be interpreted contrary to the interpretation placed upon the same wording by *White vs. Indiana Travelers.* This question of course is one of statutory construction solely. Petitioner so admitted in her application for a rehearing. Furthermore, the only positive complaint against the decision of the Court of Appeal was that this question of statutory construction was wrongfully decided. Almost the entire application was taken up with a discussion of this question. The application contained such expressions as "in the problem of original construction which this case presents to you", "the problem of construction which your Honors have before you." Far from claiming that the Louisiana case had not been followed by the Court as the pre-

sent application for certiorari contends, the application for rehearing contained such expressions as "new and original construction by your Honors in this case" and "a rehearing should be granted so that your Honors can construe par. (a) of Section 27.03 of Act 195 of 1948 which has never been previously interpreted by a Louisiana Court."

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## STATE DECISION FOLLOWED.

It is true that the Court of Appeal brushed aside somewhat abruptly, plaintiff's extended arguments on this question of statutory construction. But the Court had no other alternative as if it had taken any other course, it would have committed obvious error in not following *White vs. Indiana Travelers.*

As the Court below stated:

> "This is because, for the reasons given in White vs. Indiana, supra, the statutes relied on in the first attempt at service did not authorize such process against a foreign corporation in the situation of Excess, merely because it issued a policy in New York and delivered it to a broker in Louisiana. It is because, too, for the reason put forward by Excess, the statute specifically invoked by plaintiff as authority for the second attempt at service, was not then in existence but had been repealed, and no equivalent statute had been reenacted to take its place.

The Court was of course bound to follow *White vs. Indiana* in holding that the mere issuance of a policy in New York and its delivery to a broker in Louisiana did not constitute the doing of business in the latter state. This is the law of the case and must be respected by your Honors as well. It should be added that the Supreme Court has never decided nor even intimated that such a single and isolated act in interstate commerce could constitute the doing of business in a state.

As to the second question, it is not disputed that Act 105 of 1898 was repealed before the service, which was specifically made under it, was accomplished.

The third question as to whether the new statute which was enacted in substitution for Act 105 of 1898 was equivalent to the repealed statute is the real question in the case and the only question which engaged the principal attention of court and counsel in the Court of Appeal. It is submitted that this question was properly decided, but in any event it is a question of statutory construction which does not justify the issuance of a writ.

---

## VALIDITY OF STATE STATUTES ASSUMED.

The Court of Appeal did not attack or even question, the validity of any Louisiana Statute. On the contrary; it assumed such validity, for the opinion stated:

> "Turning to the invoked statutes, we think that, assuming their validity as against attack upon ground of denial of due process, appellee can take no comfort from reliance on them."

Plaintiff's application for rehearing admitted that the decision below did not go further than the questions of statutory construction. It said "we are constrained to believe that your Honors did not pass on the jurisdictional question" and again "since your Honors did not hold that there would have been no jurisdiction over the person of Excess if the invoked statutes had been available to paintiff".

---

## QUESTIONS OF JURISDICTION NOT PRESENTED.

Hence questions of jurisdiction are not presented by this case and can not arise until all of the conclusions of the appellate court on the questions of statutory construction are first reversed by your Honors. It is respectfully submitted that your Honors should not grant a writ in order *primarily* to review a decision involving only statutory construction, though if the question of jurisdiction were actually presented, counsel is certain your Honors would hold that the mailing from New York of a signed and completed insurance contract to assured's broker in Louisiana and nothing more was not a minimum contact so as to justify suit in a state court under an appropriate service statute, much less the doing of business so as to justify process in a federal court under Section 1391 when an appropriate process statute was lacking. At least until Louisiana plainly attempts to make sufficient the mere issuance of a policy; until it unmistakably drops its added requirement of "transacting of busi-

ness" no process can be served in a situation such as this in a federal court.

It is noted that Paragraph (3) of petitioner's specification of errors attempts to claim that respondent was "doing business in Louisiana". This assertion is directly contrary to the only Louisiana case on the subject; namely, *White vs. Indiana Travelers* and of course the Court below could not have found that the mere mailing of the policy from New York was the doing of business in the face of this state court holding to the contrary.

It should be stressed that the stipulation to which petitioner consented and which appears on page 22 of the transcript admits that there were no other ties or contacts except the issuance of a policy and the mailing of it from New York to the broker in Louisiana. It should be added that the policy, as distinguished from the usual liability policy which requires the insurance company to defend suits, did not require Excess to defend or to do anything whatever at any time in Louisiana. It was, as its name implies and as the policy contract plainly states, an "excess" contract supplementing the conventional liability policy written by Employer's Liability Assurance Corporation, the other defendant. Excess was responsible to the insured alone, for the ultimate net loss only, which the insured incurred, after the prior payment of the loss by the insured, and after the primary policy had been exhausted. It is even open to question, though the point was not pressed be-

low, whether the Louisiana Direct Action statute, permitted such a suit against a mere excess carrier under a policy such as this. In addition, if there was any general public policy of the state which made it desirable that a resident could sue an insurer (though a suit was filed on the same cause of action and is now pending in the state court directly against the public utility, the insured), it was fully satisfied by the action against Employer's Liability Assurance Corporation.

---

## PETITIONER ADMITS PROCESS STATUTES MUST EXIST.

On page 28 of her brief petitioner admits that jurisdiction must not only exist but *process* must be supported by applicable state statutes. The statutes invoked by petitioner were found not applicable by the Court of Appeal, the first because the Louisiana Appellate Court decided it did not apply, the second because it was repealed and the third because its language was the same as the first which the Louisiana Court had held was not applicable. This admission convincingly proves that this case concerns only the construction of state statutes and not questions of jurisdiction.

**REPEAL OF THE PROCESS STATUTE ACT, ACT 105 OF 1898.**

Petitioner does not cite any case which holds that despite its repeal Act 105 of 1898 could be used, *eo nomine*, as specific authority for the second service. No case has been cited, because none exists, to the effect that service can be made under a repealed statute. The case of *The Fair Ltd. vs. American Fire Insurance Company*, 135 La. 48, 64 So. 977, merely held that once a company had duly appointed the Secretary of State as its agent for the service of process such appointment continued (despite insolvency at the company's domicile) as long as a policy or liability remained outstanding (as the statute plainly provided). The case did not concern or mention a situation where the company had *not* given the Secretary of State its power of attorney. Nor did it touch on the effect of the repeal of the statute upon an unqualified company such as Excess in our case. Liwwise the case of *White vs. Indiana Travelers* did not consider what would be the effect of a repeal of the statute under which, it suggested, process could be served as the statute was still in force at the time of this decision.

But this again is a question of statutory construction. It is not suggested that petitioner has been deprived of any rights by the repeal since we are considering only the existence and applicability of state statutes in aid of process under paragraph (7) of Rule 4. No such claim could have been made in view of *Missouri Pac. R. Co. vs. Clarendon Boat Oar Co.*, 257 US 533, 42 Sup. Ct. 210, which held "Provisions for

making foreign corporations subject to service in the state is a matter of legislative discretion and a failure to provide for such service is not a denial of due process." The other claimed errors set forth in paragraphs 5 and 6 again present only questions of statutory construction. Section 21.05 of Act 195 of 1948 is clearly not applicable. It will be seen by Section 21.01, of the same act that the words "foreign insurers" refer to such companies as had qualified for the purpose of transacting business within the state. This section is in nowise equivalent to the repealed Act which sought to make the mere issuance of a policy equivalent to an appointment of an agent for service of process.

The claimed error Number 6 (page 6 of application) makes necessary a repeated reference to *White vs. Indiana Travelers* since the cited statute requires the transaction of business and the Louisiana case, as has been many times stated above, decided that the mere issuance of a policy was not the transacting of business. This Louisiana decision is the law of our case and cannot be disregarded and a contrary interpretation substituted.

Over and beyond the necessity for following on the question of statutory construction, as did the Court of Appeal, the Louisiana appellate decision above referred to, we have the comforting certainty that the Court of Appeal was correct in so construing the new act. In the first place its language was identical with

the old law construed in the Louisiana decision. In the second place only the strongest possible considerations would authorize a court to substitute "or" for "and" in the statute, which petitioner admits is necessary and argues must be done, if process in this case is to be sustaned.

In the third place there is a following section of the same statute which conclusively demolishes petitioner's argument both as to the proper construction of the section (27.03 of Act 195 of 1948) upon which she relies and also as to the public policy of Louisiana. Reference to Section 27.05 of the same act shows that the Legislature never intended an insurer to be sued if it merely issued a policy. For paragraph "C" of this section reads:

> C. Nothing in sub-section a of this section is to be construed to prevent an unauthorized insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Sub-sections b or c of Sec. 27.03 on the ground **EITHER** (1) that no policy or contract of insurance has been issued or delivered to a citizen or resident of this State or to a corporation authorized to do business therein OR (2) *that such insurer has not been transacting business in this State* or (3) that the person on whom the Service was made pursuant to sub-section c of Section 27.03 was not doing any of the acts therein enumerated (Emphasis supplied).

We find therefore that the Legislature has itself construed the section in question and has itself

enunciated the public policy of Louisiana as to suits against such insurers and that the decision below is in accord with the legislative construction and public policy of this State as well as with the only pertinent Louisiana decision.

Finally, it may be conceded that perhaps it is desirable that this Court should some day reach and decide the question as to whether the mailing of one policy over a state line and nothing more renders an insurer suable by an injured third party in a Federal Court under a direct action statute of the State of the policy's destination. Certainly none of the previous decisions of this Court would authorize such suit. Emphatically this Court has never held that such mailing alone constitutes the doing of business in a State. *Travelers Health v. Virginia*, 339 U. S. 643, is certainly not authority for such holding since it was a regulatory suit by a State and your Honors found other ties and contracts beyond the mere mailing of a policy.

But in the present case, such issue did not arise. The Court of Appeal assumed for the purpose of its decision that jurisdiction existed but found that the process statutes, which petitioner admits must exist, were lacking and that the invoked statutes either had been repealed or did not authorize the process.

## CONCLUSION.

It is therefore respectfully submitted that since only questions of statutory construction are involved in this case which questions were rightly decided and since the only pertinent State decision was followed and finally since no important questions of general or local law were involved, that, under such circumstances, no reasons exist for granting a writ.

Respectfully submitted,

MOSES C. SCHARFF,
H. L. HAMMETT,
Counsel for Respondent.

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## CERTIFICATE.

This is to certify that copies of this brief have been served on Edward Dubuisson, Counsel for Petitioner on this ..... day of October, 1951.

.....
Counsel for respondent.

CORRECTED COPY p. 9.

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OCT 31 1951
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

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## No. 319

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MRS. BEULAH FISHER LEJEUNE, Individually And As Tutrix For Her Minor Children,
Petitioner,

versus

EXCESS INSURANCE COMPANY OF AMERICA,
Respondent.

---

## PETITIONER'S REPLY BRIEF IN SUPPORT OF HER APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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EDWARD DUBUISSON,
Counsel for Petitioner.

JOHN M. WISDOM,
JAMES G. DUBUISSON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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# PETITIONER'S REPLY BRIEF IN SUPPORT OF HER APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

---

## JURISDICTION OVER DEFENDANT'S PERSON.

*MAY IT PLEASE THE COURT:*

In view of the fact that respondent's principal argument under its motion to dismiss in the trial court and in the court below was that the court had no jurisdiction over its person because it was not doing business in the state and, therefore, for the court to assume jurisdiction over it would violate the due process clause of the fourteenth amendment to the United States Constitution, it is suprising to see respondent concede in its brief in opposition that the court below did not pass on the ques-

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tion of jurisdiction. If this be true then, indeed, the question of jurisdiction may not be before this court because the action of the trial judge in overruling the motion to dismiss for lack of jurisdiction has never been reversed. However, we don't know how this court will interpret the ill-considered opinion of the court below which left wholly unconsidered an important issue in the case, so on the question of jurisdiction we wish to call attention to a most interesting decision which we ran across, after the petition was filed here, in the Southern Reporter Advance Sheets of September 20, 1951, where it was carried as one of the nationally interesting cases under "Judicial Highlights". We refer to the case of *Smyth v. Twin State Improvement Corporation*, Vt. 80 A. 2d 664 (May 1, 1951).

In that case the Supreme Court of Vermont upheld process against a foreign corporation in a suit against it in a Vermont court for damages resulting from a tort allegedly committed by the defendant in Vermont. Service of process was made under a Vermont statute providing that if a foreign corporation commits a tort in Vermont against a Vermont resident such act shall be deemed to be doing business in Vermont by such foreign corporation and be the equivalent of the appointment of the secretary of state as its agent for service of process. There as here, the process was attacked as being in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

In reaching its conclusion that the process was not unconstitutional the reasoning of the court and the authorities cited corresponds remarkably to the argument and the supporting authorities which petitioner made in her

original brief in support of her petition here. The opinion thoroughly analyzes this court's opinions in *International Shoe Company v. Washington*, 326 U. S. 310, (1945), *Travelers Health Association v. Virginia*, 339 U. S. 643 (1950) and *Hess v. Pawloski*, 274 U. S. 352 (1927), and it cited among other cases *Storey v. United Insurance Company*, 64 Fed. Supp. 896 (1946).[1] In support of its considered opinion that the question before it has not been decided by this court, which question we contend is fundamentally the same as the first federal question here presented to Your Honors, the Vermont Supreme Court said:

> "We are of the opinion that the United States Supreme Court has left undecided whether isolated tortious activity could result in a proper subjection of a foreign corporation to suit in the forum when the cause of action arose out of that activity; no generally applicable standards can be ascertained from the decisions beyond the statements in the International Shoe case, supra. Anno. 94 L. Ed. 1181. The American Law Institute indicates that the issue is open as of 1948. Restatement of the Law of Judgments sec. 23 and caveat thereto; Restatement of the Law of Conflict of Laws, 1948 Supplement, sec. 88. * * *"

In concluding its opinion the court, after stating that numerous authorities on which the defendant relied were readily distinguishable, said:

> "They all precede in time the International Shoe decision which marked **a change in the judicial climate.**"

[1] Cited in petitioner's original brief, n. 41, pg. 28.

That decision, we believe, buttresses our contention that the federal questions presented in the petition for review in this case, and particularly the first question, are of general importance, are open and call loudly for decision by this court.

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## THE DECISION BY THE COURT BELOW OF AN IMPORTANT QUESTION OF LOCAL LAW IN CONFLICT WITH APPLICABLE LOCAL DECISIONS IS GROUND FOR CERTIORARI.

In conceding that the court below had failed to reverse the action of the trial judge in overruling its motion to dismiss for want of jurisdiction over its person, respondent was apparently acting in the belief that if no federal question was presented here Your Honors could not feel justified in granting certiorari. In doing that, however, it misunderstood the rules and the practice of this court. As an illustration of the reasons that will prompt this court to review a decision of a Circuit Court of Appeals Your Honors put ahead of the presentation of a federal question the situation where a Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions * * *."[2]

A good example of the application in practice of that rule by this court is found in *Cities Service Oil Company v. Dunlap et al.*, 308 U. S. 208 (1939). The first sentence of the opinion of the court begins thus:

> "This cause is here in order that we may decide whether the Circuit Court of Appeals wrongly declined to follow the rule of the Texas Courts * * *."

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[2] Revised Rules of the Supreme Court of the United States, Rule 38, 5 (b).

And near the close of the opinion it is said:

> "* * * Petitioner was entitled to the protection afforded by the local rule * * *."

As pointed out in petitioner's original brief this court has recently and repeatedly noted the vast public importance of the transaction of insurance business, including, of course, the sale of policies across state lines, and the important question of local law which the court below decided in conflict with applicable local decisions was that there was available to petitioner in this suit, and to all other citizens of Louisiana, no statute providing for substituted service of process on an unlicensed foreign insurer which sells and delivers an insurance policy in Louisiana to a Louisiana citizen covering a Louisiana risk. The applicable local decisions with which the decision of the court below is in obvious conflict are *White v. Indiana Travelers Assurance Company*, 22 So. 2d 137 (1945), and *The Flair, Ltd. v. American Fire Insurance Company*, 135 La. 48, 64 So. 977 (1914).

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## SERVICE OF PROCESS UNDER ACT 179 OF 1918, SEC. 1, SUBDIV. (6), PAR. (c).

In its brief in opposition respondent repeatedly states that service of process was made under Act 105 of 1898, and that the service was invalid because the 1898 Act had been repealed when service was made in May, 1949. **This is a patent mis-statement of fact.** Act 105 of 1898, Art. 2, Sec. 1, which was not repealed until October 1, 1948, and was therefore in effect when the policy in suit was sold and delivered in Louisiana on June 10, 1946, and

when decedent was electrocuted on September 20, 1947, required respondent to appoint the secretary of state as agent for service of process before issuing the policy sued on, but it did not provide a method for service of process. It was not a process statute and no service was possible under its provisions. The process statute which was in effect at all times pertinent hereto, and which is still in effect as Louisiana Revised Statutes of 1950, Title 13, Sec. 3471, (5), (c), was Act 179 of 1918, generally known as the Service of Process Act, and is the statute under which the service of process was expressly made. This is clearly shown by petitioner's motion for an order of court appointing the secretary of state as agent for service of process in compliance with the requirements of that statute, **in which motion** the provision of the statute under which service was being made was **quoted in full** (R. 31-34). The compliance with the other requirements of that statute for service is shown (R. 40, 41) by the certificate of the assistant secretary of state upon whom service was made.

The reason why the procedure for service provided by **Act 179 of 1918, Sec. 1, Subdiv. (6), par. (c)** was available to petitioner against respondent is because respondent **was a foreign corporation which was required by Act 105 of 1898, Art. II, Sec. 1,** to appoint the secretary of state as its agent for service of process when the policy was sold and delivered to the assured in Louisiana on June 10, 1946, and the statute further provided that the secretary of state should continue to be respondent's process agent as long as the policy remained outstanding against respondent in Louisiana. The policy, of course, was still outstanding

when process was served on respondent under Act 179 of 1918.

Under the plain holding of the court in the *White* case if service of process had been made in this case under Act 179 of 1918 before the 1898 Act was repealed on October 1, 1948, the service would have been valid and neither the court below nor respondent has ever given any reason why the repeal of the 1898 act after this suit was filed, made service of process under Act 179 of 1918 unavailable to petitioner in May, 1949, in view of the fact that respondent was a foreign corporation which was required by Act 105 of 1898 to appoint an agent for service of process in Louisiana when the policy was delivered and had not done so. It is submitted that no good reason can be given and that the holding in the *Flair, Ltd.* case *supra,* is squarely opposed to the theory that the repeal could have had such a consequence.

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## SEC. 21.05 OF ACT 195 OF 1948 AS AN EQUIVALENT OF SEC. 1 OF ART. II OF ACT 105 OF 1898.

Petitioner contends that if it could be held that the repeal of Act 105 of 1898 defeated petitioner's right to service of process under Act 179 of 1918, that sec. 21.05 of Act 195 of 1948, which repealed Act 105 of 1898, required respondent as a foreign insurer to appoint the secretary of state as its agent for service of process and, consequently, made the process procedure of Act 179 of 1918 available to her. Neither respondent nor the court below ever gave any reason why that contention is not correct. Indeed, although that argument was pressed upon the court below

by petitioner, that tribunal did not deign even to mention or refer, indirectly, remotely or by implication to that statutory provision. We have only that court's *ipse dixit* to the effect that Act 105 of 1898 "was not then in existence but had been repealed, and no equivalent statute had been re-enacted to take its place." That *ex cathedra* pronouncement is hardly convincing and there is respectable authority for a different conclusion.

Since petitioner's original brief in support of her application for certiorari was written, Vol. 15 of West's Louisiana Revised Statutes, which are currently in process of completion, has been published. The Louisiana Revised Statutes of 1950 were prepared by the Louisiana Law Institute, a statutory body of prominent judges, lawyers and law professors, and they were prepared for publication by the Institute through arrangement with West Publishing Company. The work has been generally hailed as a scholarly and skillful model of statutory revision. In Vol. 15 L. R. S., Sec. 985, we find the re-enactment of Sec. 21.05 of Act 195 of 1948 with an annotation giving the "History and Source of Law", under which there is a sub-division, "Prior Laws", immediately under which Sec. 1 of Art. II of Act 105 of 1898 is quoted in full. The obvious fact that Sec. 21.05 of Act 195 of 1948 was an equivalent of Sec. 1 of Art. II of Act 105 of 1898 seems to have been clearly recognized by the editorial staff of the publishers of Louisiana Revised Statutes Annotated which would indicate that perhaps the court below was not justified in disregarding completely an important statute which had been pressed upon it for consideration.

## THE ACTION BY THE TRIAL JUDGE IN OVERRULING RESPONDENT'S MOTION TO DISMISS IS ENTITLED TO GREAT WEIGHT.

In considering the questions of Louisiana Law which are presented by petitioner's application for review it is, we think, important to remember that the trial judge below who overruled defendant's motion to dismiss on all grounds was an eminent Louisiana lawyer who, before his appointment to the bench, had for some years held the highest legal office in the state, that of attorney general, while none of the members of the three judge court which reversed him, except Judge Wayne G. Borah, was a Louisiana lawyer or has any special knowledge of Louisiana law.

In *Gardner, Trustee v. New Jersey*, 329 U. S. 565 (1947), this court said at page 575:

> "• • • That construction of New Jersey law made by a federal judge of the New Jersey district court is entitled to special weight. • • •"

And in *Steele v. General Mills, Inc.*, 329 U. S. 433 (1947), this court said at page 438:

> "• • • We cannot say that the District Court sitting in Texas erred in holding that no part of the claim was barred by Art. 5526. • • •"

And at page 439 the court said further:

> "• • • Under these circumstances we shall leave undisturbed the interpretation placed upon purely local law by a Texas Federal Judge. • • •"

Petitioner and her children have been victimized by the denial to them by the appellate court below of the benefit of Louisiana statutes and jurisprudence which had been recognized and accorded to them by the trial judge below who is learned in Louisiana law.

Respectfully submitted,

EDWARD DUBUISSON,
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JOHN MINOR WISDOM,
JAMES G. DUBUISSON,
Of Counsel.

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**CERTIFICATE**

This is to certify that copies of this Brief have been served on opposing counsel on this 30th day of October, 1951.

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